



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 18 OF 2003

REPUBLIC.....PROSECUTION

=VERSUS=

SHADRACK MWERO MWANDAO.....1ST
ACCUSED

SAID MWERO.....2ND
ACCUSED

RULING

The two accused persons **SHADRACK MWERO MWANDAO** (hereinafter referred to as the 1st accused and **SAID MWERO** (hereinafter referred to as the 2nd accused) are both charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the night of 27th and 28th day of December 2002 at Pemba Village Mwatate Location in Kwale District of the Coast Province, jointly with others not before court murdered NGOME MALAU KOMBO”

The prosecution led by the learned State Counsel called a total of three (3) witnesses in support of their case. The evidence of these witnesses was that on the night of 27th/28th December 2002 at about 3.00 A.M. they awoke to find the house of the deceased on fire. They all rushed to assist and help to put out the fire and to rescue any persons or items that were trapped in said house. **PW1 JACOB BOMWENDA** told the court that as they were fighting to put out the fire, they also began to search for the owner of the house. They searched within the compound and came across the body of the deceased lying outside the burning house. The body had blood oozing from the head. The deceased was naked and was unable to talk. **PW1** then rushed to inform the chief who in turn alerted police. However sadly the deceased died at the scene before help could be availed. The two accuseds who were the deceased’s sons were later

arrested and charged.

At this point this court has to determine whether the evidence of the prosecution witnesses is sufficient to show a prima facie case to warrant the 2 accused persons to be called upon to defend themselves. In any case of murder one key and crucial ingredient is that the **cause** of the death of the deceased must be established. In this case there is evidence of a fire which engulfed the whole house of the deceased. Secondly there is evidence that the witnesses saw blood oozing from injuries on the body of the deceased. The question then is – was it the fire which led to the deceased’s death or was his death as a result of the injuries which he sustained? No medical evidence was called to prove the cause of death of the deceased. The police did remove the body of the deceased to the mortuary indicating that indeed a post-mortem was conducted. The pathologist who conducted the autopsy was not called to testify neither was the post-mortem report produced as an exhibit. This is crucial evidence without which a charge of murder cannot be sustained [see **NDUNGU –VS- REPUBLIC [1985] KLR 487**]. Failure to adduce medical evidence as to the cause of death is fatal to the prosecution case.

Even if the cause of death is proved (which is not the case) I find that the evidence adduced by the three prosecution witnesses is still not sufficient to meet the required standard of proof beyond a reasonable doubt. There was no eye-witness who saw either of the 2 accused attack the deceased. No witness is able to show how the fire at the home of the deceased was started. There is no evidence on who set the fire. **PW2 MUNYASI MWERO** who is one of the deceased’s wives told the court that at the time when this incident occurred i.e. the burning of the house and the attack on the deceased, the two accused persons were not at the scene as they were out attending a ‘*disco*’ within the village. Under cross examination by **MR. LEWA** Advocate **PW2** reiterates:

“I confirm my son and stepsons had gone to a disco next to Pemba Mission School. The school is a bit far from our homestead ...”

Therefore aside from there being no evidence placing the 2 accuseds at the ‘*loqus in quo*’ on the contrary there is concrete evidence indicating that they were actually very far away from that scene.

All in all there is no nexus shown between the 2 accused persons and the death of the deceased. All that is indicated is that the two did not attend their father’s burial. This may be odd or even unusual but it is certainly not proof of any involvement on their part in the death of their father. No investigating officer testified in court to explain exactly why these two accused persons were arrested and charged. On the whole the prosecution case is woefully inadequate. No prima facie case is shown to exist. I hereby enter a verdict of ‘not guilty’ and I do acquit both accuseds of this charge of murder under S. 306(1) of the Criminal Procedure Code. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa 27th day of June 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Lewa for 2nd Accused

Ms. Kayata for 1st Accused

